

MAY 24 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE
United States

OCTOBER TERM 1976

No. **75-1697**

SAMUEL O. GUNNING, ROBERT E. GUNNING, GLORIA
SMITH, ALVINA E. GERAGHTY, ELLA R. YOUNG
and MARGARET J. McCAY,

Petitioners,

VS.

CLAUDE B. GRAY and AUDREY I. GRAY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
Third Appellate District

TIMOTHY J. EVANS,

LARIMER & EVANS,

515 D Street, Suite 3,

Post Office Drawer J,

Marysville, California 95901.

Telephone: (916) 742-2347.

Counsel for Petitioners.

Subject Index

	Page
Introduction	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	3
Statement of the case	5
A. Procedural background	5
B. Statement of facts	5
C. Assignment of error	8
Reasons for allowance of the writ	9
A. While there is no constitutional right to an appeal, if appellate procedures are established and maintained all persons within a class must be treated equally	9
B. Whether the Uren corner or the McGuire corner is recognized as the true common corner, property lines must be determined by reference to the Uren corner	12
Conclusion	12

Table of Authorities Cited

Cases	Pages
Cox v. Hart (Cal. 1922) 260 U.S. 427, 43 S.Ct. 154	12
Geraghty v. Gray (1957) 152 Cal.App.2d 344, 313 P.2d 102	7, 11
Rinaldi v. Yeager (1966) 384 U.S. 305, 86 S.Ct. 1497	10
U.S. v. MacMillan (D.C. Nev. 1971) 331 F.Supp. 435	12
U.S. v. Reiman (C.A. Utah 1974) 504 F.2d 135	12
Vickter v. Pan Pacific Sales Corp. (1952) 108 Cal.App.2d 601, 239 P.2d 463	10, 11

Constitutions

California Constitution, Art. 6, Sec. 14	4
United States Constitution, Fourteenth Amendment, Sec. 1	3

Statutes

43 U.S.C. §772	4, 9, 12
----------------------	----------

In the Supreme Court

OF THE
United States

OCTOBER TERM 1976

No.

SAMUEL O. GUNNING, ROBERT E. GUNNING, GLORIA
SMITH, ALVINA E. GERAGHTY, ELLA R. YOUNG
and MARGARET J. McCAY,
Petitioners,

vs.

CLAUDE B. GRAY and AUDREY I. GRAY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
Third Appellate District

INTRODUCTION

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate District, entered on January 5, 1976.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Third Appellate District, is printed in

Appendix A hereto, and is not reported in either the official California reports, or in the unofficial reports.

JURISDICTION

The judgment printed in Appendix A hereto, which is sought to be reviewed is dated January 5, 1976, and was entered on January 5, 1976.

A rehearing by the Court of Appeal of the State of California, Third Appellate District, was sought by a petition filed therein on January 21, 1976, and said rehearing was denied on January 27, 1976.

A hearing in the California Supreme Court was sought by petition filed therein on February 13, 1976, which petition was denied, without opinion or comment, on March 3, 1976. A copy of the denial is attached hereto as Appendix B.

QUESTIONS PRESENTED

Petitioners submit that the following questions are appropriately subject to review by this Court:

1. Does the two page opinion by the Court of Appeal of the State of California, Third Appellate District, which lacks a discussion of the facts of the case, and adopts two irreconcilable statements of facts, deny petitioners due process of law;

2. Does the opinion of the Court of Appeal of the State of California, Third Appellate District, which

lacks a discussion of the facts of the case, deny petitioners equal protection of the law;

3. Are petitioners denied due process of law where the Court of Appeal of the State of California, Third Appellate District, fails to decide, or even discuss, claimed errors in restriction of cross-examination and rejection of evidence, and then determines that the judgment of the trial court is supported by substantial evidence; and

4. Where the ownership of real property, by respondents' predecessors in interest, originates by a patent, based upon an official government survey and approved map which was subsequently determined to be inaccurate, can respondents' property ownership be extended where the extension encroaches upon property previously acquired by petitioners or their predecessors through patents based upon the same official government survey and map?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The determination of the questions hereinabove presented involve construction and application of the following constitutional provisions and statutes:

1. Constitution of the United States, Amendment 14, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. California Constitution, Article 6, Section 14:

"The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

3. 43 United States Code, *Public Lands*, Section 772:

"The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided*, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entry man, or owner of lands affected by such resurvey or retracement; *Provided further*, That not to exceed 20% of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby."

STATEMENT OF THE CASE

A. Procedural Background.

Respondents herein instituted an action in the Superior Court of the State of California, County of Yuba, numbered therein 17649, against petitioners herein, to quiet title to Lot 4 of Section 29 Township 16 North Range 6 East Mount Diablo Base and Meridian. A metes and bounds description of Lot 4 of Section 29 was included in the complaint. Petitioners herein denied that respondents were the owners of the real property described in said metes and bounds description.

Following trial the Court filed a Memorandum of Decision, indicating judgment in favor of respondents. Within the time allowed by California statutes and rules, petitioners requested findings of fact and conclusions of law, and submitted objections to proposed findings, proposed counter-findings, and requests for special findings.

Following entry of judgment, a notice of appeal was filed, briefs were submitted, the Court of Appeal of the State of California, Third Appellate District, affirmed the judgment, and the Supreme Court of California declined to hear the matter.

B. Statement of Facts.

On August 19, 1876, a map based upon the field notes of a U. S. Government Survey of Township 16 North Range 6 East Mount Diablo Base and Meridian was approved by the U. S. Surveyor General's Office.

That map showed the establishment of all section lines and corners within said township and range.

In January, 1888, the Cleopatra Quartz Mine was surveyed by Charles E. Uren, a U.S. Deputy Mineral Surveyor, and on March 28, 1888 the U. S. Surveyor General's Office approved the original field notes and issued a Plat based thereon. To establish the location of the Cleopatra claim, Uren made a tie to a point physically identifiable on the ground, which he believed to be the true section corner common to Sections 20, 21, 28 and 29 of Township 16 North Range 6 East. This section corner is hereinafter referred to as the Uren Section Corner.

The Plat of March 28, 1888 is based upon the Uren section corner, which causes the Cleopatra claim to cross the line dividing Sections 20 and 29, thereby creating Lot 12 of Section 20.

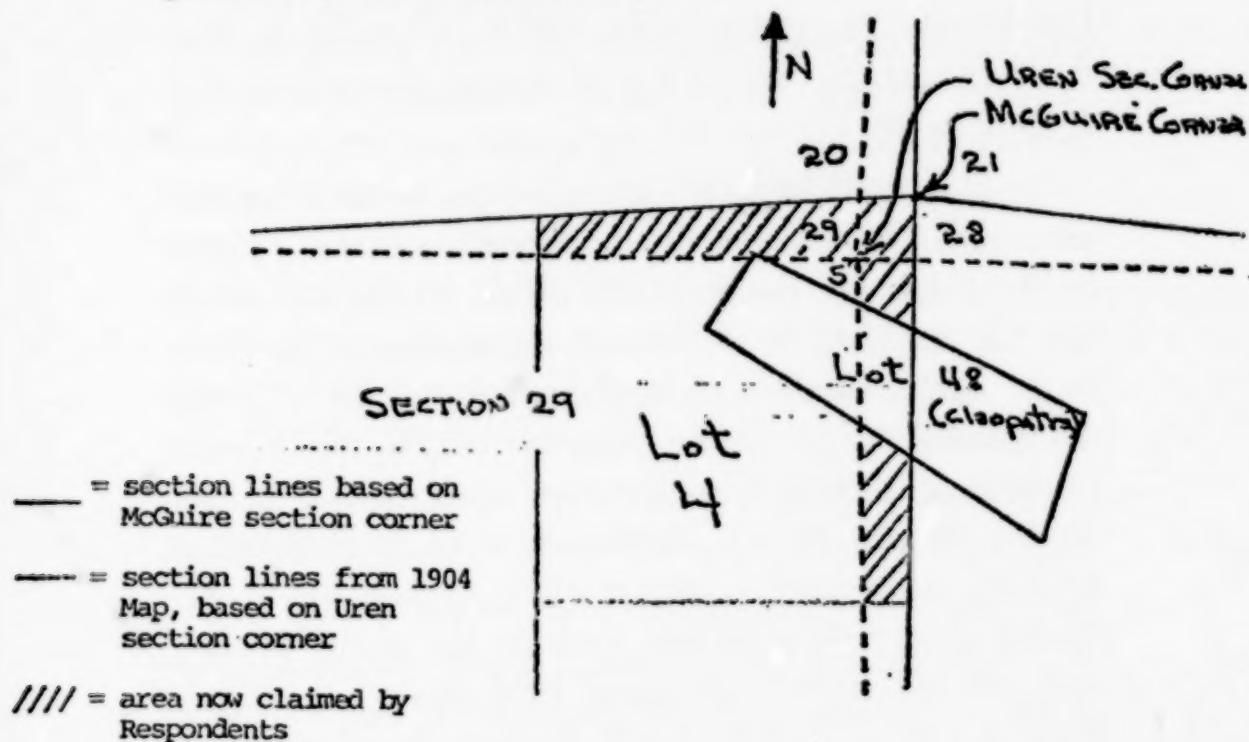
The Official Government Survey Plat of March 31, 1904, like the 1888 plat, utilized the Uren Section Corner and indicates that Lot 4 of Section 29 has 34.91 acres. On December 2, 1952, respondents herein acquired title to Lot 4 Section 29 by deed, wherein the conveyed property was described by reference to the plat of March 31, 1904, which utilized the Uren Section Corner as the Northeast corner of Lot 4. The original patent to respondents' predecessors in interest likewise describe Lot 4 by reference to the plat of March 31, 1904. Lot 4, as conveyed by reference to the Uren Section Corner shown on the 1904 map, contained 34.91 acres.

Petitioners are the owners of record of Lot 12, Section 20; Lot 5, Section 29; Lot 4, Section 28; and Lot 48—the Cleopatra Lode—which is located in Sections 28 and 29. All of the aforesaid lots adjoin Lot 4, Section 29.

On May 4, 1954, petitioners herein, or their predecessors in interest, instituted proceeding number 12404 in the Superior Court of the State of California in and for the County of Yuba to quiet title to the Cleopatra Lode, located in Sections 28 and 29. In the determination of action number 12404 the Court found that the true section corner common to Sections 20, 21, 28 and 29 was located on a point designated as such on a map based upon a survey by T. H. McGuire and Son, rather than at the point located and utilized in the 1888 and 1904 Plats (the Uren Section Corner). The Court further found that the Uren corner was located some 300 feet Southerly on a tangent from the section corner shown in the McGuire and Son map (hereinafter referred to as the McGuire Section Corner). This decision by the trial court was affirmed by the Court of Appeal of the State of California, Third Appellate District, in *Geraghty v. Gray* (1957) 152 Cal.App.2d 344, 313 P.2d 102, wherein the Court of Appeal affirmed that the Uren Section Corner, as shown on the 1888 and 1904 plans, was incorrect.

In Yuba County Action number 17649 the respondents sought to quiet their title to the property lying between the section lines, as based on the McGuire Section Corner, and the section lines as they related

to the Uren Section Corner. The following chart depicts the area in controversy:



C. Assignment of Error.

In the course of the trial of this matter, petitioners attempted to offer evidence to establish that the Uren corner was in fact physically distinguishable from the McGuire corner, and that recognition of the McGuire corner, for purposes of establishing property lines, would interfere with and alter the established property ownership of petitioners. These offers of evidence are set forth in the Reporter's Transcript on appeal at the following points:

"96:12-100:15

101:8-103:13

118:26-120:25"

The mandatory provisions of 43 U.S.C. §772 were pointed out to the trial court prior to decision in formal briefs filed with the trial court, and, following decision, in petitioners' proposed counter-findings, proposed corrected conclusions of law, and requests for special findings. Clerk's Transcript on Appeal, pages 23-29.

The applicability of 43 U.S.C. §772, and the exclusion of evidence offered in reliance upon the authority of the indicated statute, were brought to the attention of the Court of Appeal in Appellants' Opening Brief filed with the Clerk of the Court of Appeal on or about September 25, 1975.

The deficiencies in the judgment of the Court of Appeal of the State of California, Third Appellate District were brought to the attention of that Court in the Petition for Rehearing, and these matters were presented to the California Supreme Court in the Petition for Hearing.

REASONS FOR ALLOWANCE OF THE WRIT

A. WHILE THERE IS NO CONSTITUTIONAL RIGHT TO AN APPEAL, IF APPELLATE PROCEDURES ARE ESTABLISHED AND MAINTAINED ALL PERSONS WITHIN A CLASS MUST BE TREATED EQUALLY.

While not constitutionally required to do so, California does provide for appeal, as a matter of right, from judgments rendered by Superior Courts within the State of California. While court rules and statutes specify, in detail, the manner in which an appeal must be instituted, preparation of the record, form

and contents of briefs, presentation of oral arguments, and requests for reconsideration, petitioners are unable to locate any statutes or rules which define the obligation of the reviewing courts in terms of deciding appeals.

The reviewing courts in California themselves, however—at least where published opinions are concerned—have generally written full scale opinions, with relatively complete coverage of the facts, issues and authorities. The reason for such an approach was enunciated in *Vickter v. Pan Pacific Sales Corp.* (1952) 108 Cal.App.2d 601, 239 P.2d 463 as follows:

“... [B]ut reviewing courts are required to state in writing the reasons for their decisions. And the right to petition the Supreme Court for hearing renders it necessary that the opinions of the District Courts of Appeal state the case fully and fairly as to the controlling facts and the pertinent rules of law. Memorandum decisions, however desirable, would not meet the requirements of the present system.”

Where a right of appeal is granted to one litigant, but there is a failure to make the same grant to another litigant, there is a denial of equal protection of the laws, and a violation of California and United States constitutional standards. This court, in *Rinaldi v. Yeager* (1966) 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, held that unequal ease of access to the appellate process amounted to a denial of equal protection. In the instant situation, the cursory statement by the Court of Appeal represents unequal *treatment*, rather than unequal access, as is demonstrated by numerous

deficiencies in the decision, including but not limited to the following:

1. The opinion adopts the statements of facts from *both* petitioners' brief, and respondents' brief, and these statements are totally irreconcilable, since petitioners' statement is based on the premise that the Uren Section Corner has a physical location that differs from that of the McGuire Section Corner;

2. It is impossible to adopt petitioners' statement, together with the included premise, and yet hold that *respondents'* statement, adopted by the trial court, rests upon substantial evidence since respondents contended, contrary to the holding in *Geraghty v. Gray* (1957) 152 Cal.App.2d 344, 313 P.2d 102, that the Uren and McGuire corners had the identical physical location;

3. The Court of Appeal completely overlooked questions relative to exclusion of evidence on the existence of two physically separate corners, and on the issue of impairment of vested rights, should the McGuire corner be recognized.

Similarly, from the point of view of due process, an appeal is not required; on the other hand, the rules governing appeals must operate uniformly, and in a manner which will not negate further rights or remedies that the State may provide under the circumstances. *Vickter v. Pan Pacific Sales Corp.*, *supra*, 108 Cal.App.2d 601, 603.

B. WHETHER THE UREN CORNER OR THE McGUIRE CORNER IS RECOGNIZED AS THE TRUE COMMON CORNER, PROPERTY LINES MUST BE DETERMINED BY REFERENCE TO THE UREN CORNER.

The applicability of 43 U.S.C. 772 to situations similar to those presented in the instant case has been frequently recognized, both by federal courts and by state courts. *U.S. v. Reiman* (C.A. Utah 1974) 504 F.2d 135; *U.S. v. MacMillan* (D.C. Nev. 1971) 331 F. Supp. 435. A survey of public lands does not ascertain boundaries, but creates them. *Cox v. Hart* (Cal. 1922) 260 U.S. 427, 43 S.Ct. 154.

In rendering judgment for respondents herein, the California Court of Appeal has ignored 43 U.S.C. 772, together with the cases construing same, and have allowed subsequent surveys to impair vested rights.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Dated, May 19, 1976.

TIMOTHY J. EVANS,
LARIMER & EVANS,
Counsel for Petitioners.

(Appendices Follow)

APPENDICES

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

*In the Court of Appeal
State of California
Third Appellate District
(Yuba)*

3 Civil 15198
(Sup.Ct.No. 17649)

Claude B. Gray and Audrey I. Gray,
Plaintiffs and Respondents,

vs.

Samuel O. Gunning, Robert E. Gunning,
Gloria Smith, Alvina E. Geraghty,
Ella R. Young and Margaret J. Mc-
Cay,
Defendants and Appellants.

[Filed Jan. 5, 1976]

BY THE COURT:

This is a quiet title action. Judgment was for plaintiffs and against defendants, quieting plaintiffs' title to certain described lands, portions of which were claimed by defendants. Defendants have appealed from the judgment. The statements of facts contained in respondents' and appellants' briefs fairly summarize the evidence and are incorporated herein by reference.

On appeal we must look at the evidence in the light of certain well-established rules. We must view it in the light most favorable to respondents and must draw all inferences which support the trial court's findings. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926; *Ceeka v. Beckman & Co.* (1972) 28 Cal.App.3d 5, 14.)

Our review of the record in this case in the light of the above rules has convinced us that the findings of the trial court are not inconsistent, ambiguous or unsupported by the evidence as contended by defendants. The findings are supported by substantial evidence, the conclusions of law are supported by the findings, and the judgment is supported by the findings and conclusions. Under such circumstances, we cannot reverse even were we to draw different inferences from the evidence than the trial court. (See *Fallert v. Hamilton* (1952) 109 Cal.App.2d 399, 404; *Drzewiecki v. H & R Block, Inc.*, (1972) 24 Cal.App. 3d 695, 705-706; cf. *Geraghty v. Gray* (1957) 152 Cal. App.2d 344.)

The judgment is affirmed.

For the Court:

Puglia, P.J.

Friedman, J.

Evans, J.

Appendix B

Clerk's Office, Supreme Court
4250 State Building

San Francisco, California 94102

Mar 3 1976

I have this day filed Order Hearing Denied

In re: 3 Civ. No. 15198

Respectfully,
Gray vs. Gunning

G. E. Bishel
Clerk